



**CASE NO. CA 6/2001**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**JOSÉ AMERICO DE ALMEIDA**

**APPELLANT**

VS

**THE STATE**

**RESPONDENT**

**CORAM: MILLER, AJ**

Heard on: 13 April 2011

Delivered on: 07 June 2012

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**CRIMINAL APPEAL JUDGMENT:**

**MILLER, AJ:** [1] This is a curious case in which a bank robbery, on incomplete case record and the conversion of the appellant to christianity become intertwined.

[2] The appellant was charged in the Regional Court sitting in Windhoek with the following crimes:

1. Housebreaking with intent to rob and robbery with aggravating circumstances.

## 2. Robbery with aggravating circumstances.

[3] Following a protracted trial he was convicted on both counts on 18 September 2001. The appellant was thereupon sentenced to fifteen (15) years imprisonment on the first charge and to ten (10) years imprisonment on the second charge.

[4] The appellant thereupon filed a Notice of Appeal against both the convictions and the sentenced imposed whether or not that Notice was filed out of time is no longer of any moment.

[5] The matter become bogged down, however, mainly because there were difficulties in preparing the record of the proceedings before the regional magistrate. As it turned out much later certain parts of the record could not be transcribed rendering the record incomplete. Regrettably the matter was allowed to linger on with the result that the appeal was enrolled for hearing only on 26 November 2004.

[6] On 16 November 2004 the appellant filed what was meant to be his principal Heads of Argument. They were more in the nature of a confession as is evident from paragraph 1.3 and 1.4 of the document with I quote:

“

1.3 My Lords I now accept my conviction and do not wish to contest it anymore, but I will bring to the attention of this Honourable Court of Justice the many irregularities in this case of mine. My Lords the reason I will point the irregularities on my case, are for the interest of justice and fair trial, now and future case.

I am a layman without any training in the law and will rest this matter in the hands of this Honourable Court of Justice to decide and apply justice in accordance with the law.

- 1.4 The reason of the change of heart and not continuing with the appeal against conviction, is because of my encounter and relationship with our Lord Jesus Christ, who has changed my entire life into a new person. I am now a born again Christian, who met God in prison. Before coming to prison I did not know God as I do now and I am a very blessed one to have met God before anything else could have happened with me, per example death. I do not do anymore what I use to do in past, before coming to prison. During my trial I lied to avoid coming to prison, but now I can not lie anymore, for the spirit of God lives in me and I can not deny and trample the precious blood of my Lord Jesus who died for my sins. I can not ever tell a lie again, no matter the circumstances or the consequences thereafter. I do not see things the way I use to see in the past, I now see things the way God sees it, and I am very sorry for the mistakes of my past life and God knows that I am speaking the truth. Upon being sentenced in a great agony I cried out to God and in His compassion He reached and touched me and I am a new person totally devoted to God. By telling those who come in contact with me about God.”

[7] I must say in fairness to the appellant though that as far as the sentence imposed are concerned, he may have indicated a desire to pursue an appeal against those, although the submissions contained in this document are more in the nature of a plea for mercy based upon his acceptance of his wrongdoing. Nothing was advanced as to any misdirection on the part of the magistrate. Nor was anything said about the sentence being too severe.

[8] Speaking for myself, the matter should have ended there. However, the Court, on 26 November 2004, postponed the hearing of the appeal to a date to be arranged with the Registrar. The postponement was to afford the regional magistrate a further opportunity to reconstruct the record.

[9] Ultimately on 19 November 2010, van Niekerk J and Silungwe AJ in a comprehensive judgment gave further direction for the reconstruction of the record. The orders issued were the following:

**“IT IS ORDERED:**

1. That the matter is postponed to a date, for the hearing of the appeal, to be arranged with the Registrar, which shall be a date during the first term of 2011. The parties must approach the Registrar at 9h00 on the first Wednesday after the date of this order to arrange the date of hearing.
2. That the Clerk of the Court, Windhoek must, with the assistance of the Office of the Prosecutor-General, obtain affidavits from the witnesses Pedro Stander, Elizabeth van Greunen, Phillemon Ntinda, Leevi Erkki, Magdalena Cloete and Felix Dionisio to prove the evidence which was adduced at the trial in the manner set out in this judgment.
3. That after the record has been reconstructed it must be furnished to the appellant to establish whether he agrees therewith or not. The reaction of the appellant must be confirmed by affidavit.
4. That if it is not possible to reconstruct the record, the Clerk of the Court must state so on affidavit together with detailed reasons why it could not so be reconstructed.
5. That the reconstruction process must be done under the supervision of a senior magistrate in the Magistrate's Office, Windhoek and must be completed by the end of January 2011.
6. That the appellant must file an application for condonation for the late filing of the amended notice of appeal dated 22 August 2006 should he wish to prosecute the appeal.”

[10] Thus it happened that the matter was ultimately heard by me sitting as a single judge being so directed by the Judge President.

[11] It also became apparent that the appellant had another change of heads since he prepared his heads of argument on 16 November 2004. His quest for

eternal salvation was explained by one for freedom in his lifetime, and I mean no disrespect to the political party who coined the phrase.

[12] In argument before me the appellant submitted that it was his constitutional right to write the "letter" as he called it, on 16 November 2004. With that submission I can find no fault.

The appellant submits further that he has also a constitutional right to withdraw the "letter", which he did or so he says. To bolster this argument he points to the fact that the "letter" is not in the form of an affidavit. I was not referred to any specific provision in the Constitution upon which the appellant relies and I could not find any such provision.

[13] I nonetheless permitted the appellant to advance the appeal on the basis that due to a still incomplete record, the conviction and sentence imposed should be set aside.

[14] By the time the matter come to be heard by me, the direction given for the reconstruction of the record by van Niekerk J and Silungwe AJ had been complied with. I am satisfied that the record, thus re-constructed, was sufficient to permit the adjudication of the appeal on its merits.

[15] As far as the merits are concerned it was common cause that the Okahandja branch of Bank Windhoek was broken into on the day of the crime and a large sum of cash and traveller's cheques were stolen by force.

[16] A certain Ms. von Greunen who works for the bank was also robbed of a car. The only real issue before the magistrate was whether or not the appellant was one of the perpetrators. Since he raised a *alibi* in his defence.

[17] Apart from being seen near the scene of the crime at the relevant time, the appellant was arrested shortly thereafter. The appellant pointed out certain bank

notes and traveller's cheques to the police. These were identified by the bank employee as having been part of the stolen goods.

[18] This evidence was accepted by the learned magistrate and in my view correctly so.

[19] The state established beyond reasonable doubt that the appellant was one of the perpetrators of the crime.

[20] As far as sentence is concerned, no irregularities appear, nor do the sentence imposed does not strike me as being disproportionate to the crimes committed.

[21] I would therefore decline to interfere with the sentences imposed.

[22] In the result the appeal is dismissed.

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**MILLER AJ**

**ON BEHALF OF THE APPELLANT:** In person

**ON BEHALF OF THE RESPONDENT:** Mr. Marondedze

**INSTRUCTED BY :** OFFICE OF THE PROSECUTOR GENERAL